

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 755 of 1997

Shri Mhamulal Husen Momin .. Appellant
(Orig.defendant)

V/s

1. Gulahamad Babalal Satarmaker
2. Mahirajbi Babalal Satarmaker
3. Rafik Babalal Satarmaker
4. Ekabal Babalal Satarmaker
5. Baby Ayesha Babalal Satarmaker
6. Khurshidbi Mansur Meher
7. Rubeda Ibrahim Attar ... Respondents
(Orig.plaintiffs)

Shri S.V.Sadavarte for Appellant

Shri C.G.Ghavnekar for Respondent no.1

CORAM:S.R.SATHE, J.

DATED: 16th August 2005

ORAL JUDGMENT: -

1. The appellant original defendant in Regular Civil Suit NO.648 of 1981 has preferred this appeal against the judgment and order passed by the Court of 5th Additional

District Judge, Kolhapur in Regular Civil Appeal No.38 of 1995, whereby, the suit filed by the present Respondents for redemption of mortgage was decreed in their favour and the defendant no.1 i.e. present Appellant was directed to hand over possession of the suit property to the plaintiff within two months from the date of order.

2. The brief facts giving rise to this appeal are as under :

. The suit property bearing City Survey No.251/A, C Ward of Kolhapur was initially owned by one Babalal Satarmaker. He died on 27-5-1962 leaving behind son viz. Gulmahamad B. Satarmaker, original plaintiff in Regular Civil Suit NO.648 of 1981 and Mahirajbi, step mother of plaintiff Gulamahamad and Rafiq and Iqbal i.e. other step brothers of the plaintiff. Plaintiff Gulamahamad and other heirs of Babalal had taken an amount of Rs.1,000/- from the present Appellant Mhamulal Husen Momin on 9-6-1966. On 29-6-1966 further amount of Rs.2960/- was paid by Mhamulal to plaintiff and others and as such the suit property which is the shop premises admeasuring 22' x 8' situated on the ground floor of the said building was mortgaged by plaintiff Gulamahamad and others to the present Appellant for total amount of Rs.3960/- and registered mortgage deed was executed and possession of the said property i.e. shop premises was also given to the present Appellant. By virtue of stipulation embodied in the said mortgage deed

it was agreed that the Appellant shall use the said property for a period of 3 years and after the expiry of such period mortgage should hand over the possession to the Respondents i.e. mortgagors. After the expiry of period of 3 years from 29-6-1966 present Appellant had no right to remain in possession. However, he continued in the suit premises and started claiming a tenancy in respect of the suit premises. For that purpose, he also issued notice dated 11-8-1970 to the mortgagor i.e. original plaintiff. He, however, gave reply to the said notice and denied the stand of the appellant and asked the Appellant to hand over the possession. The Appellant, however, did not hand over the possession and on the contrary filed Misc. Civil Application No.6 of 1973 under Section 11 of Bombay Rent Act and for fixation of standard rent. The said application was strongly opposed by the present Respondent no.1. However, subsequently on 16-6-1975 the present Appellant withdrew his standard rent application. Similar application was filed by him subsequently but the same was also withdrawn. In the meantime the present Respondent no.2, step mother of Respondent no.1 filed Regular Civil Suit NO.669 of 1968 for partition and in that suit decree was passed in her favour and it was held that she as well as Respondent no.1 along with others are having share in the suit property.

3. On 26-6-1991 the present Respondent no.1 filed Regular Civil Suit No.648 of 1981 for a declaration that mortgage in question has been redeemed and prayed for possession of

the suit property. He also claimed means profits.

4. As the other co-sharers viz. present Respondent nos.2 to 7 were not ready to join the Respondent no.1 in filing the above mentioned suit, they were impleaded as defendants nos.2 to 7.

5. The above mentioned suit was opposed by the present Appellant-original defendant no.1 by filing written statement Exh.27. He admitted that mortgage deed dated 29-6-1966 has been executed. However, contended that prior to expiry of the period of 3 years of the said mortgage other co-sharers viz. defendant nos.2 to 7 executed registered rent note in his favour and accepted him as a monthly tenant of the suit premises at monthly rent of Rs.110/-. The said lease was created for a period of 3 years from 29-6-1969. He further contended that as per rent note he paid rent from time to time and the same was accepted by original plaintiff as well as his other co-sharers. The defendant, therefore, contended that after expiry of mortgage period of initial 3 years, the mortgage transaction came to an end and as such there is no question of redemption of the mortgage. The appellant original defendant no.1 therefore prayed for dismissal of the suit.

6. During the pendency of the said suit plaintiff filed an application Exh.29 for transposing original defendant nos.2 to 7 as plaintiffs and accordingly the said

application was allowed and original defendant nos.2 to 7 were transposed as plaintiff nos.2 to 6.

7. On the pleadings of the parties the trial Court framed issues Exh.33. In order to prove the suit claim plaintiff no.1 Gulamahamad examined himself as Exh.41 and also produced photo copy of the mortgage deed at Exh.42. As against this in order to show that the suit premises are occupied by him as a tenant since 29-6-1969 at monthly rent of Rs.110/- the original defendant Mhamulal Momin examined himself as Exh.45 and also produced certain documents including rent receipts executed by Mahirajbi Satarmaker.

8. After considering the evidence on record the trial Court came to the conclusion that the alleged rent note executed by the original defendant nos.2 to 7 was not legal and valid and the same was executed when the period mentioned under mortgage deed in fact had not expired. The trial Court also held that even if that rent note is taken into consideration it was prepared to defeat the rights of the present Appellant plaintiff and it amounts to a clog on redemption. He therefore, held that defendant no.1 is not a tenant in the suit premises and plaintiff is entitled for redemption of mortgage and possession of the suit property. He therefore decreed the suit in plaintiff's favour and directed the original defendant to hand over possession within two months.

9. Being aggrieved by the above mentioned order the original defendant no.1 i.e. present Appellant filed Regular Civil Appeal No.38 of 1995 in the District Court, Kolhapur. After hearing the arguments of both the learned Advocates the first appellate court i.e. 5th Additional District Judge, Kolhapur came to the conclusion that document dated 29-6-1966 was self redeeming mortgage and defendant no.1 failed to prove that he is in possession of the suit premises as a tenant vide rent note dated 23-6-1969. He also held that alleged rent note amounts to clog on redemption, naturally he held that decree passed by the trial Court is legal and correct and therefore confirmed the same and dismissed the appeal.

10. The above mentioned order of the first Appellate Court is challenged in the present second appeal. While admitting the appeal on 12-12-1997 this Court (Radhakirhsnan J.) passed the following order :

"Heard the Counsel for the parties.

In view of the Apex Court judgment in AIR 1965 SC 225 and as grounds (A), (B) and (E) raise substantial question of law.

. Admit.

Hearing Expedited.

Grounds A, B and E are as under :

(A) Whether both the Courts below erred in holding that the Appellant is a mortgagee in spite of fact that Respondents have executed a rent receipt in favour of Appellant which was on record?

(B) Whether the learned trial Court erred in holding that the Appellant has not adduced any evidence in support of his status as tenant?

(E) The learned trial Court ought to have considered that the Respondents have accepted the rent as per the said rent note and this fact was not denied by them which is sufficient to hold that there is a relation of tenant and landlord?

11. In this appeal before me, Shri Sadavarte, learned Advocate for the Appellant has in fact urged only two points. Firstly, he submitted that transaction dated 29-6-1966 was not of a mortgage but relationship of landlord and tenant was to be created between the owner of the property and the Appellant, but with a view to save the property from clutches of the Bombay Rent Act mortgaged deed was executed. He therefore submitted that real transaction was not of mortgage and as such plaintiff was not having any right of redemption. Secondly, he canvassed before me that even if it is assumed that

original transaction was of a mortgage still by virtue of execution of rent note by other co-sharers in favour of the present Appellant on 23-6-1969 the appellant is entitled to retain suit property as a tenant and decree for possession cannot be passed against him. He therefore, submitted that appeal be allowed and the order passed by the courts below be set aside. As against this, Shri Gavnekar, learned Advocate for the Respondents supported the judgment and order passed by the Courts below. He also submitted that admittedly the original plaintiff no.1 had not executed any rent note in favour of present Appellant -original defendant no.1 and as such it cannot be said that legal tenancy was created in favour of the present Appellant by executing the original mortgage transaction. He also subedited that even if we take into consideration the alleged rent note it certainly amounts to creating clog on redemption and as such it cannot be said that legal tenancy is crated in favour of the present Appellant. He therefore, prayed for dismissal of the appeal.

12. The execution of the mortgage deed Exh.42 is not in dispute. It is also an admitted fact that by virtue of stipulations embodied in the said mortgage deed the mortgagee was put in possession and it was agreed that after the completion of 3 years period it will be held that mortgagee money has been satisfied and then the mortgagee was to hand over the possession to the mortgagor. Having taken into consideration this position

the mortgagee was in fact not entitled to contend that real transaction was not of mortgage but of creating tenancy and in order to save the property from clutches of the Bombay Rent Act sham and bogus document of mortgage deed was executed. On the contrary, if we take into consideration the evidence on record and in particular the averments made by the present Appellant the original defendant in Misc. application NO.176 of 1982 Exh.53 filed by him for fixation of standard rent, we find that therein also he had clearly admitted that he was put in possession and remained in possession till 29-6-1969 by virtue of mortgage. Even in the rent note Exh.52 also it is clearly mentioned that the possession that is given to the present appellant because of the mortgage transaction. Even in the said document it was clearly observed that his possession is in consideration of the mortgage money. So, having regard to the evidence on record both the Courts below have rightly held that initial transaction dated 29-6-1966 was of a mortgage and a deed executed between the parties was a mortgage deed.

13. The main and the material question to be decided in this matter is whether the mortgage that was created by virtue of registered mortgage deed Exh.42 was cancelled or came to an end after completion of 3 years period mentioned in the mortgage deed and whether tenancy was created in favour of Appellant mortgagee from 30-6-1969 as per rent note Exh.52. At the outset it must be mentioned that original plaintiff no.1 is admittedly not signatory

to the rent note in question. Right from the beginning he has contended that the suit premises have not been leased out to the Appellant original defendant. If at all there is any such rent note the same must have been obtained by the Appellant by joining hands with other co-sharers and the said rent note is not legal and valid. It is needless to say that by virtue of mortgage deed Exh.42 the mortgagors were definitely having a right of redemption. It is well settled that right of redemption under mortgage deed can come to an end only in a manner known to law. It has been held in *Jaya Singh Dnyano v Krishna Bubaj* **AIR 1985 SC 1946** In the instant case, after the completion of period of 3 years mentioned in the mortgage deed no other specific document was executed between the parties for cancellation of mortgage transaction. So, merely because some of the co-mortgagors executed rent note in favour of the mortgagees it cannot be said that initial transaction of mortgage had come to an end. While considering this aspect we cannot ignore the well settled law that "once a mortgage is always a mortgage". So merely because some of the co-sharers had executed rent note it cannot be said that transaction dated 27-6-1966 ceased to be a mortgage. On the contrary it is pertinent to note that alleged rent note has been executed on 23-6-1969 when initial period of mortgage i.e. 3 years was even not over. Under such circumstances, when only some of co-sharers executed the rent note and thereby the other co-sharers agreed to lease out property to mortgagee for a further period of 3 years from 29-6-1969, it amounts to fetter in the mortgage

transaction. In other words, the said agreement of lease in fact created any clog on redemption. The learned Advocate for the Appellant argued before me that rent note has not created any clog on redemption. On the contrary it has put an end to the earlier transaction of the mortgage. For this proposition he has placed reliance on a case Umedi Lal and others V/s Jagan Prasad and others **AIR 1965 SC 225**. I have carefully gone through the said authority. The facts of the said case and the facts of the case in hand are quite different. In the above mentioned reported case the mortgage deed executed in the former State of Alwar provided inter alia that after the house which was the mortgage property was delivered over to the mortgagee, it was open to him either to live in it, or to let it out to tenants. The mortgagee was further given liberty to spend up to Rs.35/- for repairing the house and if more expenses were intended to be incurred, the said expenditure would be incurred through the mortgagor. It was further mentioned that mortgagor would get the property redeemed on payment of the mortgage amount as well as the cost of Patta which may have been incurred by the mortgagee and the repairing expenses within a period of 15 years. The Apex Court under such circumstances has held that stipulation, "After the expiry of the stipulated period of 15 years, this shop would be deemed as an absolute transfer Mala Kalam for this amount" is a clog on redemption and as such has to be ignored. In the instant case the mortgage deed is silent for the creation of any tenancy. However, the separate agreement

or rent note has been executed between some of the co-mortgagors and the mortgagee for creating tenancy rights in favour of the mortgagee. That has certainly affected the right of redemption of one of the co-sharers viz. the original plaintiff no.1 Gulmahamad and as such the same has to be ignored.

14. Thus it is very clear that the appellant original defendant is not having valid tenancy rights. It may be that by joining hands with some of the co-mortgagors he might have obtained some rent receipts to show that he has paid rent of the suit property but that would not bind the other co-mortgagors and it cannot take away the right of redemption of the other co-mortgagors.

15. Having regard to all the facts and circumstances and position of law, it has to be held that both the Courts below have rightly held that the transaction in question was of self redeeming mortgage and plaintiff is entitled to get possession of the suit property.

16. In this view of the matter there is no substance in this appeal. The appeal is dismissed with costs.

. However, the possession of the suit property is to be delivered within two months from today.

(S.R.SATHE, J.)

